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Letter dated 15 April 2013 from the Secretary-General to the President of the Security Council

In accordance with article 17 (3) of the Relationship Agreement between the United Nations and the International Criminal Court, I have the honour to convey the attached communication dated 27 March 2013 from the President of the Court (see annex). The President transmits the decision on the non-compliance of the Republic of Chad with the cooperation requests issued by the Court regarding the arrest and surrender of Omar Hassan Ahmad Al-Bashir, issued by Pre-Trial Chamber II of the Court on 26 March 2013 in the case of the *Prosecutor v. Omar Hassan Ahmad Al-Bashir* (see enclosure).

I should be most grateful if you would bring the present letter and its annex to the attention of the members of the Security Council.

(*Signed*) **BAN** Ki-moon

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Annex

Letter dated 27 March 2013 from the President of the International Criminal Court to the Secretary-General

Pursuant to article 17 (3) of the Relationship Agreement between the United Nations and the International Criminal Court, as well as in accordance with article 87 (7) of the Rome Statute and regulation 109 (4) of the Regulations of the Court, and as requested by Pre-Trial Chamber II, I hereby transmit the decision on the non-compliance of the Republic of Chad with the cooperation requests issued by the Court regarding the arrest and surrender of Omar Hassan Ahmad Al-Bashir, issued by Pre-Trial Chamber II of the Court on 26 March 2013 (see enclosure), and refer this matter to the Security Council.

I would be grateful if you could transmit the present letter and its enclosure to the Security Council.

(*Signed*) Sang-Hyun **Song**

Enclosure

Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No.: ICC-02/05-01/09
Date: 26 March 2013

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN DARFUR, SUDAN

THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR

Public Document

Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir

Document to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
Ade Omofade, Trial Lawyer

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives
Competent authorities of
the Republic of Chad

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Deputy Registrar
Mr Didier Preira

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

No.: **ICC-02/05-01/09**

26 March 2013

Pre-Trial Chamber II (the "Chamber") of the International Criminal Court (the "Court" or "ICC") issues this decision on the non-compliance of the Republic of Chad with the cooperation requests issued by the Court regarding the arrest and surrender of Omar Hassan Ahmad Al-Bashir ("Omar Al-Bashir").

I. PROCEDURAL HISTORY

1. On 31 March 2005, the Security Council, acting under Chapter VII of the Charter of the United Nations (the "UN Charter"), adopted Resolution 1593 (2005) referring the situation in Darfur to the Court.[1]

2. On 4 March 2009 and 12 July 2010, Pre-Trial Chamber I ("PTC I") issued two warrants of arrest against Omar Al-Bashir.[2] These warrants of arrest remain to be executed.

3. On 6 March 2009 and 21 July 2010, the Registry, acting upon PTC I's request, issued the "Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir"[3] and the "Supplementary request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir", respectively.[4] These requests called for the cooperation from all States Parties in the arrest and surrender of Omar Al-Bashir, pursuant to, *inter alia*, articles 89(1) and 91 of the Rome Statute (the "Statute").

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[1] S/RES/1593 (2005).
[2] ICC-02/05-01/09-1; ICC-02/05-01/09-95.
[3] ICC-02/05-01/09-7.
[4] ICC-02/05-01/09-96.

4. On 27 August 2010, PTC I issued the "Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad".[5]

5. On 13 December 2011, PTC I also issued the "Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir".[6]

6. On 15 March 2012, the Presidency issued the "Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d'Ivoire situations", in which it re-assigned, *inter alia*, the situation of Darfur, Sudan to this Chamber.[7]

7. On 14 February 2013, the Chamber received the "Prosecution's notification of possible travel in the case of *The Prosecutor v. Omar Al Bashir*, pursuant to Article 97 of the Rome Statute" (the "Prosecutor's First Notification"),[8] in which the Prosecutor averred, based on media reports, that Omar Al-Bashir might visit the Republic of Chad and the State of Libya during the weekend of 16-17 February 2013.[9]

8. On the same day, the Chamber requested the Registry to send notes verbales to the Republic of Chad and the State of Libya, enquiring about said visit, and reminding the former of its obligations with respect to the arrest and surrender

[5] ICC-02/05-01/09-109.
[6] ICC-02/05-01/09-140.
[7] ICC-02/05-01/09-143.
[8] ICC-02/05-01/09-144 and its annex.
[9] ICC-02/05-01/09-144.

of Omar Al-Bashir to the Court. This was reiterated in the Chamber's "Order Regarding Omar Al-Bashir's Potential Visit to the Republic of Chad and to the State of Libya" of 15 February 2013 (the "Order").[10]

9. On 19 February 2013, the Registry filed the "Report on the execution of the 'Order Regarding Omar Al-Bashir's Potential Visit to the Republic of Chad and the State of Libya'" (the "First Registry's Report" or "First Report").[11] According to the information provided in the First Report, the Registry transmitted on 12 and 15 February 2013 respectively, two notes verbales concerning said visit, to the Embassy of the Republic of Chad in the Kingdom of Belgium reminding the relevant State of its obligations under the Statute.[12] The Embassy of Chad acknowledged receipt of the first note verbale sent by the Registry on 12 February 2013.[13]

10. Based on the First Registry's Report and the relevant annexes appended thereto, Omar Al-Bashir's visit to the Republic of Chad took place on 15 and 16 February 2013, without prior consultation with the Court as required by virtue of article 97 of the Statute.[14]

11. On 22 February 2013, the Chamber issued the "Decision Requesting Observations on Omar Al-Bashir's Visit to the Republic of Chad" (the "Decision Requesting Observations"), in which it ordered the Registry to provide the Republic of Chad with a copy of the First Registry's Report.[15] The Chamber also

[10] Pre-Trial Chamber II, ICC-02/05-01/09-145.
[11] ICC-02/05-01/09-146 and its confidential annexes (1-5) as well as public annex (6).
[12] ICC-02/05-01/09-146, pp. 4-5.
[13] ICC-02/05-01/09-146, p. 5.
[14] ICC-02/05-01/09-146-Conf-Anx1.
[15] Pre-Trial Chamber II, ICC-02/05-01/09-147, p. 6.

requested the Republic of Chad to submit observations, no later than Thursday 14 March 2013, on: "1) the alleged failure to execute the requests for arrest and surrender of Omar Al-Bashir to the Court and; 2) the alleged failure to consult with the Court in case of any problems identified which might have impeded the execution of the requests for arrest and surrender of Omar Al-Bashir during his visit".[16]

12. On 15 March 2013, the Registry filed the "Report of the Registry on the execution of the 'Decision Requesting Observations on Omar Al-Bashir's Visit to the Republic of Chad'" (the "Second Registry's Report" or "Second Report").[17] According to the Second Report, the Registry transmitted to the competent authorities of the Republic of Chad, by way of a note verbale, the First Report as well as a copy of the Chamber's Order in their original English language on 25 February 2013.[18] The Registry also transmitted a second note verbale on 28 February 2013, concerning the French translation of these documents.[19]

13. In response to said notes verbales, the Second Report reveals that "the Government of Chad was likely to request the Court for an extension of time to submit its observations" in compliance with the Chamber's Decision Requesting Observations.[20] However, by the time the Second Report was filed, the Registry had not received any request for an extension of time from the Republic of Chad concerning the submission of their observations. This occurred notwithstanding the fact that the Registry had sent an email on 15 March 2013 to the Embassy of

[16] Pre-Trial Chamber II, ICC-02/05-01/09-147, p. 6.
[17] ICC-02/05-01/09-149-Conf and its annexes.
[18] ICC-02/05-01/09-149-Conf, para. 1.
[19] ICC-02/05-01/09-149-Conf, para. 2.
[20] ICC-02/05-01/09-149-Conf, para. 3.

the Republic of Chad requesting a "justification for missing the deadline of 14 March 2013".[21]

14. On 15 March 2013, the Prosecutor filed another notification regarding Omar Al-Bashir's visit to the Republic of Chad, which was scheduled to take place on 18 March 2013 (the "Prosecutor's Second Notification").[22]

15. On 21 March 2013, the Chamber received the "Report of the Registry on the observations submitted by the Republic of Chad on Omar Al-Bashir's visit to the Republic of Chad" (the "Third Registry's Report or "Third Report"),[23] in which it is mentioned that on 20 March 2013 the Registry received the requested observations lacking any explanation regarding their late submission.

II. APPLICABLE LAW

16. The Chamber notes articles 21, 86, 87(7), 89 and 97 of the Statute; regulations 23 *bis*, 29(1), 35 and 109(2), (3) and (4) of the Regulations of the Court (the "Regulations").

III. DETERMINATION BY THE CHAMBER

Preliminary Issue

17. In the Decision Requesting Observations, the Chamber requested the Republic of Chad to submit its observations concerning the subject matter of the present decision no later than Thursday 14 March 2013. As referred to above, the

[21] ICC-02/05-01/09-149-Conf, paras 4-6.
[22] ICC-02/05-01/09-148 and its annex.
[23] ICC-02/05-01/09-150 and its annex.

Republic of Chad has transmitted its observations after the lapse of the deadline specified by the Chamber, without providing any explanation for said delay as provided for in regulation 35(2) of the Regulations.

18. In this regard, the Chamber notes regulation 29(1) of the Regulations, which stipulates that "[i]n the event of non-compliance by a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice". According to the second paragraph, "[t]his provision is without prejudice to the inherent powers of the Chamber". The reference to "inherent powers" suggests that the Chamber is entitled to take any measure which it deems appropriate in the event of non-compliance "with an order of a Chamber".

19. The Republic of Chad is considered to be a party for the limited purpose of these proceedings, and therefore, the terms of regulation 29 of the Regulations apply to the case *sub judice*. In light of the non-compliance with the deadline provided for the submissions, as set out in the Decision Requesting Observations, the Chamber considers that the Republic of Chad has waived its right to be heard on the matter pursuant to regulation 109(3) of the Regulations, and accordingly, the appropriate remedy is to disregard its observations.[24]

[24] See in this regard, Pre-Trial Chamber II, *Situation in the Republic of Kenya*, "Decision on the Second Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and rule 194 of the Rules of Procedure and Evidence", ICC-01/09-97, paras 13-14; Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on Thomas Lubanga Dyilo's Application for Referral to the Pre-Trial Chamber/in the Alternative, Discontinuance of Appeal", ICC-01/04-01/06-393, para. 13.

Merits

20. Turning to the merits, the Chamber notes that the Republic of Chad is a State Party to the Statute since 1 January 2007, and accordingly, it is under the obligation, in accordance with articles 86 and 89 of the Statute, to execute the pending decisions and orders of the Court concerning the arrest and surrender of Omar Al-Bashir.

21. In this respect, the Chamber recalls the First, Second and Third Registry's Reports as well as the Prosecutor's First and Second Notifications. Reading these documents in their entirety, as summarised in the procedural history section, clearly reveals that the Government of the Republic of Chad continues to welcome the visits of Omar Al-Bashir on its territory without any attempt to arrest him, despite several warnings on the part of the Court. The Government of Chad has also, contrary to article 97 of the Statute, avoided consultations with the Court prior to said visits in order to resolve any problems concerning the execution of the pending cooperation requests. By so doing, the Government of the Republic of Chad is engaging in a consistent pattern of deliberately disregarding not only the Court's decisions and orders related to its obligation to cooperate in the arrest and surrender of Omar Al-Bashir, but also the Security Council Resolution 1593(2005).[25] This course of action calls upon the Security Council to take the necessary measures it deems appropriate.

22. In this context, the Chamber wishes to point out that, unlike domestic courts, the ICC has no direct enforcement mechanism in the sense that it lacks a police

[25] S/RES/1593 (2005). Notably, the Republic of Chad is a member of the United Nations since 1960, and accordingly, by virtue of article 25 of the UN Charter, it is bound "to accept and carry out the decisions of the Security Council in accordance with the [...] Charter".

force. As such, the ICC relies mainly on the States' cooperation, without which it cannot fulfil its mandate. When the Security Council, acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security, it is expected that the Council would respond by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of the relevant State Party to the Statute to cooperate in fulfilling the Court's mandate entrusted to it by the Council. Otherwise, if there is no follow up action on the part of the Security Council, any referral by the Council to the ICC under Chapter VII would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile.

23. Having said the above, the Chamber recalls article 87(7) of the Statute according to which, "[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute [...] the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council". Since the Republic of Chad has failed to cooperate with the Court with regard to the arrest and surrender of Omar Al-Bashir, thus preventing the institution from exercising its functions and powers under the Statute, the Court cannot but refer the matter to the Assembly of States Parties and the Security Council.

FOR THESE REASONS, THE CHAMBER HEREBY

a) decides to disregard the observations of the Republic of Chad;

b) finds that the Republic of Chad: 1) has failed to comply with its obligations to consult with the Chamber in accordance with article 97 of the Statute on the problem(s) which have impeded the execution of the requests for arrest and surrender of Omar Al-Bashir during his visit; and 2) has failed to cooperate with the Court by deliberately refusing to arrest and surrender Omar Al-Bashir, thus preventing the Court from exercising its functions and powers under the Statute;

c) refers, in accordance with article 87(7) of the Statute and regulation 109(4) of the Regulations, the present decision to the President of the Court for transmission to the Security Council, through the Secretary General of the United Nations, and to the Assembly of States Parties; and

d) orders the Registry to reclassify document ICC-02/05-01/09-149-Conf as public.

Done in both English and French, the English version being authoritative.

Judge Ekaterina Trendafilova
Presiding Judge

Judge Hans-Peter Kaul

Judge Cuno Tarfusser

Dated this Tuesday, 26 March 2013
At The Hague, The Netherlands

No.: ICC-02/05-01/09

26 March 2013